Litigation Section of The State Bar of California

Litigation Update

Litigation Section News

June 2004

State agencies should think twice before removing a case to federal court. Where an agency of the State removed a wrongful termination case to the federal court, it waived the State's immunity from suit under the Eleventh Amendment. *Embury v. King* (9th Cir., 3/16/04) 2004 DJDAR 3336.

Does the Hague Convention permit service abroad by mail? A federal case has held that service by an American plaintiff on an English defendant by regular mail to a post office box was valid. The court held that the Hague Convention permits service by mail and that one then looks at the local law of the country where service took place to determine the permissible manner of service by mail. England's domestic law permits service by mail to a post office box. *Brockmeyer v. Marquis Publications* (9th Cir., 3/24/04) 2004 DJDAR 3646. But California cases are split on this issue. See cases collected in *Denlinger v. Chinadotcom Corp.* (2003) 110 CA4th 1396, 1399-1400, [2 CR3d 530, 533-534]; *also see, In re Alyssa F.* (2003) 112 CA4th 846, 853, [6 CR3d 1, 5] and *Honda Motor Co. v. Superior Court* (1992) 10 CA4th 1043, 1046-1047, [12 CR2d 861, 862-863].

No prior permission required to claim punitive damages in elder abuse cases. Our Supreme Court resolved a conflict among appellate courts as to whether the procedural prerequisites to seeking punitive damages in an action for damages arising out of the professional negligence of a health care provider [CCP § 425.13(a)] apply to punitive damage claims in an action alleging elder abuse [Welf.&Inst.C. §§ 15600 *et seq.*]. The court held that as long as the pleading is sufficiently specific in alleging elder abuse, no prior court permission is required before punitive damages may be claimed. *Covenant Care, Inc. v. Superior Court* (Cal.Supr.Ct., 3/25/04) 2004 DJDAR 3685.

Changes in rules pertaining to sealed records. New rules effective this year revise procedures pertaining to sealed records in general tightening the requirements that must be met before records may be sealed. A new procedure closes a gap in present procedures where the party submitting documents obtained from another party does not wish to have the records sealed even though they may be subject to a confidentiality agreement or protective order. California Rules of Court, rule 243.2 (b) now requires that such documents be lodged in a sealed and marked envelope, as required by rule 243 (d), and that the filing party give notice to the party who originally produced the documents that they will be unsealed unless the producing party files a motion or application to seal the records. Such a motion must be filed within 10 days. Cal. Rules of Ct. § 243.2 (b) (3) (A) and (B).

Action for malicious prosecution is subject to anti-SLAPP statute. Action for malicious prosecution by insured who had been prosecuted for insurance fraud against his disability insurance carrier was subject to the anti-SLAPP statute [CCP § 425.16] because the insured was able to demonstrate the existence of a prima facie case of liability, the judgment of dismissal was affirmed. Also, the trial court did not err in denying plaintiff's motion for a continuance to conduct discovery where the motion was made for the first time at the time of the hearing of the anti-SLAPP motion. *Dickens v. Provident Life and Accident Insurance Co.* (2DCA4, 4/7/04) 2004 DJDAR 4332.

NOTE: If a delay in the hearing of a scheduled motion is necessary, it is always better practice to move for a continuance on an ex parte basis as soon as possible and not to wait until the hearing to seek a continuance. Before the hearing the judge has probably spent time reviewing the motion and the opposition.

Litigation Section Events

2004 State Bar of California Annual Meeting

October 7–10, 2004
Monterey, CA

For registration and information visit www.calbar.org/litigation

A Week in Legal London

June 28–July 2, 2004

For registration and information call Wayne Currier at (415) 538-2546 or visit www.calbar.org/litigation

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Jury Instructions

We would like to hear about any problems or experiences you've had with the new jury instructions. Please provide your comments by sending them to Paul Renne at PRenne@cooley.com or to Rick Seabolt at RLSeabolt@HRBlaw.com

This effort would be largely wasted if the hearing were continued.

Inability to pay for arbitration may not preclude the process to go forward. The Ninth Circuit has ruled that under the rules of the American Arbitration Association, the arbitrator has the power to compel a party to pay more than a pro-rata share of the cost of the arbitration where another party is unable to pay its share. *Lifescan, Inc. v. Premier Diabetic Services, Inc.* (9th Cir., 4/13/04) 2004 DJDAR 4523. The decision is based on the language of the AAA rules and does not necessarily apply in situations where there is no rule permitting such cost shifting.

Move fast when suing the bank for honoring a forged check. A one-year limitations period applies to depositors' claims against banks for payment of forged checks. *Chatsky and Associates v. Superior Court* (4DCA1, 4/12/04) 2004 DJDAR 4513; 2004 WL 766116. Because Commercial Code section 4111, is more general and is inconsistent with Code of Civil Procedure section 340(c), the one year statute of limitations, the court applied the rule that the more specific statute governs. The Charsky court disapproved of arguably contrary dictum in *Edward Fireman Co. v. Superior Court* (1998) 66 Cal.App.4th 1110, 1125.

Amended rule governs motions to continue trials. California Rules of Court, rule 375 was rewritten to provide an extensive list of circumstances that may constitute good cause to continue a trial and additional criteria to be considered by the court when ruling on such a motion. When seeking a trial continuance, be sure to examine this revised rule and attempt to meet as many of the criteria for continuance as are applicable to your case.

Continuing to prosecute after discovering it lacks probable cause is a basis for liability. A lawyer who commences a lawsuit without probable cause is, of course, potentially liable for malicious prosecution. But what if the lawyer only discovers the lack of probable cause after the suit has been initiated? Until now the answer to this question was not clear under California law. Now it is. In *Zamos v. Stroud* (Cal.Supr.Ct., 4/19/04), 2004 DJDAR 4693, our Supreme Court held that lawyers may be liable for malicious prosecution if they continue to prosecute a lawsuit after discovering that it lacks probable cause. Although the case only addresses the potential liability of lawyers, presumably clients who insist on proceeding with a case after discovering the lack of probable cause may likewise be liable.

Discovery games are in the category of "extreme games"; you are lucky if you don't get hurt. The Ninth Circuit has once again affirmed terminating sanctions against a party who "refused to fully respond to [plaintiff's] interrogatories…. gave contradictory answers, made frivolous objections, and filed baseless motions." *Computer Task Group, Inc. v. Brotby* (9th Cir., 4/19/04) 2004 DJDAR 4733.

Changes to B&P § 17200 to be on the ballot. Larry Doyle, the State Bar's director of governmental affairs, reports that an initiative sponsored by "Californians to Stop Shakedown Lawsuits," has qualified an initiative for the November ballot. The initiative, if adopted, will seriously limit actions under Bus. & Prof. Code § 17200.

Lawyer cannot enforce arbitration agreement with client except as provided in the mandatory fee arbitration act. A retainer agreement that includes an agreement to arbitrate any dispute "concerning fees…or any other claim relating to [his] legal matter which arises out of [his] legal representation," is invalid as contravening statutory rights under the mandatory fee arbitration act. Bus. & Prof. Code, § 6200 *et seq.*; *Aguilar v. Lerner* (Cal.Supr.Ct., 4/22/04) 2004 DJDAR 4897. But in the cited case, plaintiff was held to have waived his rights under the act by filing suit against the lawyer for legal malpractice.

Perhaps a pre-dispute jury waiver passes muster after all; more will be revealed. In our April issue we reported that *Grafton Prtners LP v. Sup.Ct.* (2004) 9 CR3d 511 invalidated a pre-dispute jury waiver, holding that a jury could only be waived in a statutorily approved manner. On April 21, the California Supreme Court granted review so the case no longer may be cited.

In a transactional malpractice case plaintiff must still prove probability of more favorable result. On remand from the Supreme Court, *Viner v. Sweet* (2DCA7, 4/23/04) 2004 DJDAR 4963, held that the "case within a case" requirement is not necessary in a case claiming legal malpractice in a transaction as distinguished from litigation. But plaintiff must still prove that, but for the malpractice, a more favorable result would have been obtained.

In class action settlements the attorney fee must be determined by the court. Where parties to a class action enter into a settlement agreement, they usually also provide for attorney fees to class counsel. But regardless of the wording of the agreement the amount of such fees is always subject to court approval and the court may only approve fees to the extent it deems them to be reasonable. *Garabedian v. L. A. Cellular Telephone Co.* (4DCA3, 4/29/04) 2004 DJDAR 5162.